United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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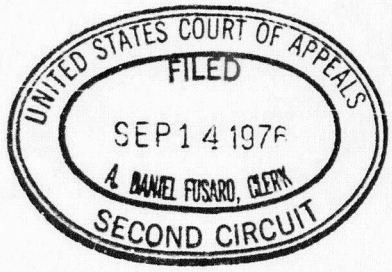
76-7272

To Be Argued By:
ANDREW C. FREEDMAN



United States Court of Appeals

For The Second Circuit

Docket No. 76-7272

RICHARD S. KAYE,
Plaintiff-Appellant,

against

FUNDING SYSTEMS CORPORATION,
Defendant,

and

EQUIMARK CORPORATION,
Defendant-Appellee.

[redacted] BRIEF OF DEFENDANT-APPELLEE EQUIMARK CORPORATION

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-against-	:	Docket No. 76-7272
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Defendant,	:	
-and-	:	
EQUIMARK CORPORATION,	:	
Defendant-Appellee.	:	

BRIEF OF DEFENDANT-APPELLEE

COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the amended complaint properly dismissed as moot where the plaintiff-appellant Richard S. Kaye ("Kaye") solely sought to enjoin the defendant-appellee Equimark Corporation ("Equimark") from using its majority ownership of the shares of Funding Systems Corporation ("FSC") to

(a) create a quorum at any FSC shareholders meeting;

(b) exercise any control over the affairs of FSC; and

(c) vote any of its FSC shares, when on April 22, 1975 Equimark announced publicly that all of its shares of FSC had been sold?

The District Court held that there was no longer any case or controversy and that this action against Equimark was moot.

2. Was the amended complaint properly dismissed where Kaye claimed that Equimark's sale of FSC stock was a "sham" when

(a) from April 23, 1975 to March 1, 1976 Kaye took no discovery to support this claim;

(b) when Kaye was afforded a final opportunity by the District Court on January 29, 1976 to take discovery, he elected to take only one deposition; and

(c) the District Court afforded Kaye a further opportunity to file briefs, memoranda or pleadings in support of his claim he willfully defaulted?

The District Court held that the amended complaint should be dismissed.

STATEMENT OF THE CASE

This is an appeal from an Order of the United States District Court for the Southern District of New York (Carter, J.) (A-536)* granting the motion of Equimark to dismiss the amended complaint (A-215-230) for lack of jurisdiction of the subject matter pursuant to Rule 12(h)(3), Fed. R. Civ. P. (A-vi).

STATEMENT OF THE FACTS

This action was commenced by Order to Show Cause on December 23, 1974. At that time, Equimark was the majority shareholder of FSC. (A-2,216). In his initial and amended complaints (A-1-14; 215-230) Kaye, a shareholder of FSC, purported to set forth claims for relief against Equimark under the Bank Holding Company Act and the federal securities laws in support of his allegation that Equimark unlawfully acquired its FSC stock in 1971 (A-10-14, 226-229). The complaint and amended complaint sought an injunction prohibiting Equimark from using its ownership of the alleged unlawfully acquired stock:

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* Unless otherwise indicated, all parenthetical references are to the Appendix.

(a) to create a quorum at any meetings of the shareholders of FSC; and/or

(b) to exercise any control over the affairs of FSC; and

(c) to vote any of the unlawfully acquired stock. (A-14,230)

On December 26, 1974 the District Court refused Kaye's application to restrain or enjoin Equimark (A-193), but issued a temporary restraining order against the holding of the annual shareholders meeting of FSC which was scheduled for the following day. (A-189) After an immediate appeal by FSC, this Court reversed the District Court's order and the FSC shareholders meeting was held as scheduled. (A-199)

After answering the complaint (A-200), Equimark moved for summary judgment on February 14, 1975. (A-205-232) That motion was not decided by the District Court because on April 22, 1975, Equimark announced that it had sold all of its FSC shares. By letters dated April 23, 1975 and May 9, 1975, Equimark's counsel advised the Court and counsel for the other parties that all of Equimark's shares of FSC had been sold and therefore the action had become moot. (A-330-331,344-345) In addition, copies of various documents evidencing that sale were furnished to the Court and counsel. (A-370-375,347-349) Thus, since the Spring of 1975, Equimark has repeatedly claimed that the District Court lacked subject matter jurisdiction over this claim.

Kaye's Willful Failure to Take Discovery

Prior to Equimark's sale of its FSC shares, on February 28, 1975 Kaye had noticed a deposition of Equimark and requested the production of voluminous documents having no readily apparent relationship to the allegations of the amended complaint. (A-223-247). Thereafter, Kaye's putative discovery of Equimark was repeatedly adjourned to and including September 22, 1975 (A-309-321); on September 17, 1975, then United States Magistrate Gerald L. Goettel stayed discovery pending a determination by the District Court as to whether there was any necessity, in view of Equimark's sale of its FSC shares, for Kaye to conduct unlimited discovery. (A-339).

Thereafter, at a conference requested by the parties with the Hon. Robert L. Carter on November 5, 1975 and in response to Equimark's claim that this action was moot, Kaye alleged that Equimark's sale of its FSC shares was a "sham". (A-339.) As a showing of good faith at that conference, Equimark voluntarily offered Kaye the opportunity to examine the person at Equimark most familiar with the sale of its FSC stock. (A-335). Kaye rejected the offer, demanding that he be allowed to depose M.A. Cancelliere, Equimark's Chairman

and Chief Executive Officer. Subsequently, Kaye was advised by letter dated November 10, 1975 that Mr. Cancelliere was not particularly knowledgeable with regard to the sale transaction in issue and would not be made available for a deposition. Kaye was advised that Robert F. Kastelic, Equimark's Executive Vice-President, was the person most knowledgeable about the sale and that he would be made available for examination. (A-335-336)

Subsequently, Kaye moved pursuant to Rule 37, Fed. R. Civ. P., for an order compelling discovery of Equimark through the production of voluminous and irrelevant documents, in view of Equimark's sale of its FSC shares, and compelling the deposition of M.A.Cancelliere. (A-322-332). On January 29, 1976, Kaye's motion was denied because he had failed to demonstrate any valid reason for his arbitrary refusal to depose Equimark through its executive Vice-President, Robert F. Kastelic. (A-355). The Court further directed that the plaintiff

> be afforded the opportunity to depose Mr. Kastelic but that deposition must be taken within thirty (30) days from the date this motion appears in the NEW YORK LAW JOURNAL; and within that period, plaintiff is ordered (1) to conclude discovery in respect of the issue before the court, which is the validity of the FSC sale of stock and (2) to file whatever motion, memoranda, or other pleadings that it deems appropriate by March 15, 1976. The matter will then be before the court for final disposition....

Notice of this Order appeared in the New York Law Journal on February 3, 1976. (A-364).

After waiting 16 days from publication of the Notice of Order, Kaye noticed Mr. Kastelic's deposition on February 19, 1976. That deposition was scheduled to be taken 11 days later on March 1, 1976 at the office of Kaye's counsel.(A-356-357). Thereafter, although plaintiff was acting under a strict court Order to file whatever motion, memoranda, or other pleadings that he deemed appropriate by March 15, 1976, he willfully failed to do so.(A-541). Instead, on March 15, Kaye sought additional time but the request was denied by the Court.(A-540).

On May 6, 1976, Judge Carter granted Equimark's motion and dismissed the amended complaint against Equimark stating that Kaye had produced no evidence whatsoever to support a claim that the sale by Equimark of the FSC stock was a "sham". (A-536-542). Judge Carter found that Kaye's failure to abide by his Order of January 29th to conclude discovery was willful. (A-541).

ARGUMENT

POINT I

EQUIMARK DOES NOT OWN ANY STOCK IN FSC, AND THEREFORE THIS ACTION IS MOOT. THUS, THERE IS NO LONGER ANY JUSTICIABLE CONTROVERSY AND ACCORDINGLY THE COURT LACKS JURISDICTION OVER THE SUBJECT MATTER.

This is an action which, as against Equimark, solely seeks to enjoin Equimark from using its position as a shareholder of FSC to (a) create a quorum at any FSC shareholders meetings; (b) exercise any control over the affairs of FSC; and (c) vote its FSC shares. In April 1975, Equimark sold all of its FSC shares. Moreover, there is no reasonable expectation that Equimark can hereafter vote any FSC shares. Accordingly, this action is moot and should be dismissed.

It is axiomatic that when there no longer exists a case or controversy between the parties, an action becomes moot and the Court must dismiss it, either at the suggestion of the parties or sua sponte, for lack of subject matter jurisdiction. Rule 12(h)(3), Fed. R. Civ. P. Mootness is a jurisdictional question because "the Court is not empowered to decide moot questions or abstract propositions." SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972); North Carolina v. Rice, 404 U.S. 244,246 (1971); U.S. v. Alaska S.S. Co., 253 U.S. 113,116 (1920); California

v. San Pablo & Tulare R. Co., 149 U.S. 308,314 (1893). This issue commonly arises when:

> [I]ntervening events beyond the control of either party raise the question whether relief remains possible and useful, or in which the defendant has either voluntarily abandoned the challenged position or conduct or has completed conduct sought to be prevented. Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §3533 (1975) at p. 263.

Federal Courts are without power to decide questions that cannot affect the rights of litigants in the case before them. U.S. Constitution, Art III: DeFunis v. Odegaard 416 U.S. 312,316 (1974); North Carolina v. Rice, supra; Amalgamated Asso. v. Wisconsin Emp. Rel. Bd., 340 U.S. 416,418 (1951); St. Pierre v. U.S., 319 U.S. 41,42 (1943). This inability on the part of the federal judiciary:

> to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy. Liner v. Jafco, Inc., 375 U.S. 306 fn.3 (1964).

See also North Carolina v. Rice, supra; Powell v. McCormack, 395 U.S. 486,496 n.7 (1969); Sibron v. New York, 392 U.S. 40,50, n.8 (1969). Therefore, a Court will ordinarily not decide a question that has become moot, such as where a decision could not be made effectual by a judgment. More than eighty years ago, the United States Supreme Court held:

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. Mills v. Green, 159 U.S. 651,653 (1895).

The test of mootness is whether Equimark has demonstrated that there is no reasonable expectation that the alleged wrong will be repeated. 13 Wright, Miller & Cooper, Federal Practice and Procedure; Jurisdiction §3533 at p. 282; U.S. v. Concentrated Phosphate Export Ass'n., 393 U.S. 199, 202-204 (1968). It is the party seeking relief (Kaye) rather than Equimark who must satisfy the Court that any relief is still needed because of:

> [S]ome cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. U.S. v. W.T. Grant Co., 345 U.S. 629,633 (1953).

While any determination of mootness is based upon its particular facts, it is clear that Equimark is no longer a shareholder of FSC.(A-370-375,344-345). Nevertheless, the gravamen of this action is to enjoin Equimark from utilizing its ownership of FSC shares to affect FSC.(A-14,230).

On April 22, 1975, more than one year prior to the District Court's dismissal of this action, Equimark announced that it had disposed of its FSC stock. (A-330-331, 344-345). Since that time, Kaye never refuted this contention despite a more than ample opportunity to attempt to do so.* Moreover after making repeated, wholly-unsupported allegations that

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* In fact, even prior to that date, Kaye made no meaningful effort to pursue the discovery he had initiated. Apparently, Kaye elected to pursue his discovery independent of this action, under the Freedom of Information Act, a manner which proved similarly fruitless. See Kaye v. Burns, 411 F.Supp. 897, 905 (S.D.N.Y. 1976). In that case, Judge Carter held:

> ...there is little doubt that this action was brought to further plaintiff's commercial interest. Plaintiff has been in litigation before this court with both Equimark Corporation and Funding Systems Corporation since December, 1974, Kaye v. Funding Systems Corporation and Equimark Corporation, 74 Civ. 5628. The Freedom of Information Act action was doubtless related to the discovery in plaintiff's dispute with Equimark and Funding Systems. As such, there has been little, if any, benefit to the public by virtue of plaintiff's action.

Having charted his discovery course and run aground, Kaye now pursues this frivolous appeal.

Equimark's sale of its FSC shares was a sham, Kaye's last-ditch effort to establish this remaining contention at the examination of Robert F. Kastelic was completely unavailing.(A-541)*

Kaye has not and cannot satisfy this burden of showing that relief is still needed. There is no reasonable expectation that Equimark can, in the future, vote the FSC shares which are the subject of this complaint. Nor does Kaye contend this.**

This action is now moot, and nothing can be gained from continuing the litigation except undue harassment of Equimark. Equimark is a publicly reporting company and must continue to disclose this meritless litigation. In addition, Equimark should not be required to bear this cost ad infinitum and litigate a moot claim, where its only other alternative would be to ransom peace from a tenacious plaintiff doggedly pursuing a meritless action.

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* To the extent Kaye argues that Equimark, in some unstated fashion, "controls" FSC even though Equimark is no longer a shareholder of FSC (Appellant's Brief, p. 3), it is an attempt to amend his already amended complaint by implication; a method not permitted under the Federal Rules of Civil Procedure. Thus Kaye argues that the issue which "should have been before the Court" pertained to "control" (Appellant's Brief, p. 16), thereby conceding that his amended complaint did not present that issue for determination.

** Significantly, the relief Kaye seeks in this action has already been afforded. Since Equimark is no longer an FSC shareholder, it no longer has rights as a majority shareholder to affect FSC.

POINT II

KAYE MADE NO EFFORT TO OBTAIN MEANINGFUL DISCOVERY AND WILLFULLY FAILED TO COMPLY WITH AN ORDER OF THE DISTRICT COURT.

For almost one year, Kaye knew that Equimark claimed this action was moot. During that time, he did not seek meaningful discovery on this issue. The District Court afforded Kaye ample opporutnity to attempt to refute Equimark's contention but he defaulted. Under these circumstances, dismissal of the amended complaint was proper.

In this action, Kaye made no sustained effort to obtain meaningful discovery, most particularly after Equimark announced the sale of its FSC stock on April 22, 1975. By a series of stipulations, all of Kaye's scheduled discovery was postponed to and including September 22, 1975.(A-309-321). Contrary to the facts, Kaye now implies that the District Court misunderstood his efforts to obtain discovery.(A-540-54; Appellant's Brief, p. 4) by suggesting that the Court based its dismissal upon an unspecified erroneous premise. This implication appears to be at variance with the facts.

The record establishes that compliance with Kaye's initial discovery request dated February 28, 1975 was repeatedly postponed with his consent.(A-309-321). The failure to

obtain documents or testimony pursuant to that notice rests upon Kaye since he could have refused to adjourn discovery. When he finally sought discovery pursuant to Rule 37, Fed. R. Civ. P. on January 12, 1976, Kaye requested voluminous, irrelevant documents and sought to examine only M. A. Cancelliere, the Chairman and Chief Executive Officer of Equimark. (A-322-332) Equimark contended that Mr. Cancelliere did not have extensive knowledge concerning the sole issue then before the Court, which was the validity of the sale of FSC stock by Equimark.(A-335-336, 355). Since Kaye failed to support his claimed need to depose Mr. Cancelliere, the District Court directed Kaye to depose Mr. Robert F. Kastelic, the person who Equimark represented as being most familiar with the sale transaction in issue.(A-355,359). Moreover, the District Court directed Kaye to conclude his discovery within thirty days. (A-355). He was then given an additional two weeks to file "whatever motion, memoranda, or other pleadings," he deemed appropriate so that the matter would be "before the Court for final disposition." (A-355.)

Notwithstanding the time limitations set by the Court in its Order, Kaye waited 16 days from the date of publication of the Court's Order and on February 19, 1976 noticed Mr. Kastelic's deposition to be taken 11 days later

on March 1, 1976. He willfully failed to take depositions of the purchasers of Equimark's shares of FSC, FSC's transfer agent, or any other person who might be able to supply facts to support Kaye's unsupported allegations of a "sham" transaction.* Moreover, Kaye willfully failed to file any motions for further discovery, including reasonable, relevant document production, by March 15, 1976 in compliance with the District Court's Order. Yet, nothing in the District Court's Order prevented Kaye from conducting additional

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* Kaye argues that the District Court only permitted him to take one deposition. (Appellant's Brief, p. 11). As set forth above, this claim is not supported by the record; he elected to take only one deposition -- a conclusion shared by Judge Carter. (A-540-541). To the extent that Kaye now claims that the Kastelic deposition was unsatisfactory for his purposes (Appellant's Brief, pp. 6-10), he had a remedy under Rule 37, Fed. R. Civ. P. which he elected not to pursue.

discovery despite ample opportunity to do so.* Thus the District Court held:

> It is clear that plaintiff has had ample opportunity, both before and after the order of January 29th, to conduct relevant discovery, yet he has failed to avail himself of this opportunity.
>
> There has been absolutely no evidence adduced to support plaintiff's claim that the sale of Equimark of the FSC stock was a sham. Thus, Equimark's contention that it no longer owns any shares of FSC stock, and the documentary evidence submitted in support of this contention stand unrebutted. Furthermore, there is no reason on the record before me to depart from the March 15, 1976 deadline for the completion of discovery and the filing of any motions. Plaintiff's willful failure to abide by the order of January 29th to conclude discovery on the only issue remaining before me requires that this action, at long last, be terminated. (A-541) .

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* The cases cited by Kaye in support of his appeal are inapposite and do not support the relief sought on this appeal since he was never denied reasonable discovery on the issues before the Court either by way of testimony or through documentary production. Kaye's principal reliance is on Schoenbaum v. Firstbrook, 405 F.2d 215 (2nd Cir. 1968). In contrast to the instant case, that action was a derivative suit in which the defendants were granted summary judgment before the plaintiff had an opportunity to resort to discovery procedures. 405 F.2d at 218. Here Kaye had ample opportunity but lacked "interest"; apparently preferring to rely upon inference, suggestion and innuendo. Similarly, Robinson v. Penn Central Company, 58 F.R.D. 436 (S.D.N.Y. 1973) was a derivative action alleging securities fraud in which a defendant was granted summary judgment even though the plaintiff had little or no opportunity for discovery. 58 F.R.D. at p. 440. These facts are simply not analogous to the instant case. Kaye's reference to Loeb v. Whittaker Corp., 333 F. Supp. 484 (S.D.N.Y. 1971), which is cited incorrectly in appellant's brief, is inexplicable since it bears no apparent relationship to the facts at bar.

Kaye's willful failure to comply with the District Court's Order to conclude discovery in order to establish facts which might support Kaye's hitherto unsupported suggestions and innuendos leads to the inescapable conclusion that the dismissal below was reasonable and proper. Rule 37(b)(2)(C), Fed. R. Civ. P. establishes unequivocally the discretionary power of a District Court judge to dismiss an action because of a party's failure to obey a Court Order. In fact, Rule 37 specifically states that a failure to comply with an order may result in dismissal of the action by the District Court. Only where the failure to comply is caused by an inability to do so and not because of willfulness, bad faith, or any fault of the party, should a less drastic sanction be imposed. Societe Internationale v. Rogers 357 U.S. 197,212 (1958).

Indeed, this Court has consistently adhered to the distinction between benign inability to comply and serious, willful non-compliance. See Grace v. Fisher, 355 F.2d 21 (2d Cir. 1966); Nasser v. Isthmian Lines, 331 F.2d 124 (2d Cir. 1964); Gill v. Stolow, 240 F.2d 669 (2d Cir. 1957). Moreover, in determining what sanction would be just, the District Court may properly consider the full record. Link v. Wabash Railway Co., 370 U.S. 626,633-634 (1962); Diapulse Corp. of America v. Curtis Publishing Co., 374 F.2d 442,447 (2d Cir. 1967).

In this case, it is clear from a review of the full record that Kaye had sufficient opportunity before and after the District Court's January 29, 1976 Order (A-355) to obtain discovery relative to his contention that the sale of the FSC stock was a "sham". In demonstrating that he had no facts to support his claim, Kaye merely requested additional time to make unspecified motions after he was expressly directed by the Court to conclude discovery and file any motions by March 15, 1976. He elected not to do so; an action which the District Court found was willful and which was apparently taken with full knowledge of the sanctions available under Rule 37. Moreover, the Court found that Kaye's failure to comply was not a consequence of any disability.

Clearly, a dismissal of an action is justified under the Federal Rules when a plaintiff willfully and flagrantly disregards the general rules of discovery and a specific Court Order. With respect to the sanctions available under Rule 37 (b)(2)(C) Chief Judge Lumbard of this Court specifically admonished that:

> [w]here one party has acted in wilful and deliberate disregard of reasonable and necessary court orders and the efficient administration of justice, the application of even so stringent a sanction is fully justified and should not be disturbed. Trans World Airlines Inc. v. Hughes, 332 F.2d 602,614 (2d Cir. 1964).

Most recently, the United States Supreme Court reversed the Third Circuit Court of Appeals and reinstated a dismissal of a complaint by the District Court pursuant to Rule 37 where the plaintiffs had failed to answer interrogatories propounded by the defendants. National Hockey League v. Metropolitan Hockey Club, 440 U.S.L.W. 3754-3755 (June 30, 1976). In finding that the District Court did not abuse its discretion and had been extremely patient in allowing the plaintiffs ample time to respond to the Court's discovery orders, the Supreme Court set forth the applicable standards for a reviewing court in this situation:

> There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the District Court.

> But here as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that these respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts. Under the circumstances of this case we hold that the district judge did not abuse his discretion in finding bad faith on the part of these respondents, and concluding that the extreme sanction of dismissal was appropriate in this case by reason of respondent's "flagrant bad faith" and their counsel's "callous disregard" of their responsibilities.

Upon the facts of the instant case, the language and rationale of the Supreme Court in the National Hockey League case are applicable and the same conclusion may be properly reached.

The willful default found by Judge Carter is supported by the record and dismissal of the amended complaint was a proper exercise of the District Court's discretion.

CONCLUSION

The decision of the Court below dismissing the amended complaint should be affirmed in all respects.

Respectfully submitted,

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